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No. 604

No. 15394

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United States Court of Appeals

for the Ninth Circuit

BRUCE G. BARBER, District Director, Immigration and Naturalization Service, San Francisco, California,

Appellant,

vs.

KURT RIETMANN,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California. Southern Division.

FILED
FEB - 8 1957
PAUL P. O'BRIEN, CLERK

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—2-8-57

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Certificate of Clerk to Record on Appeal 17

Certificate of Clerk to Record on Appeal, Supplemental 18

Counsel, Names and Addresses of 1

Docket Entries, Excerpts From 16

Notice of Appeal, Filed November 13, 1956 14

Notice of Appeal, Filed December 12, 1956 15

Notice of Appeal, Filed December 28, 1956 18

Order Granting Petition for Writ of Habeas Corpus 9

Order Issuing Writ of Habeas Corpus and Discharging the Petitioner 13

Order to Show Cause 7

Petition for Writ of Habeas Corpus 3

Return to Order to Show Cause and Response to Petition for a Writ of Habeas Corpus 8

Statement of Points 20

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In the United States District Court for the Northern District of California, Southern Division

No. 35712

In the Matter of

The Application of KURT RIETMANN for a Writ of Habeas Corpus.

PETITION FOR A WRIT OF HABEAS CORPUS

To the Honorable, the Judges of the United States District Court for the Northern District of California, Southern Division:

The petition of Kurt Rietmann, hereinafter referred to as petitioner, respectfully shows that the petitioner is unlawfully imprisoned, detained, and restrained of his liberty by Bruce G. Barber, District Director, Immigration and Naturalization Service, San Francisco, California, hereinafter referred to as the respondent, in the said Northern District of California, Southern Division thereof; that said imprisonment, detention, confinement, and restraint are illegal and that the illegality thereof consists of this, to wit:

I.

The petitioner is a citizen of Switzerland who first entered the United States at New York on July 1, 1949, at which time he was admitted as a permanent resident.

II.

Petitioner applied for relief from training and

service in the United States armed forces on March 19, 1951, and was granted such relief on the basis of his application on Form SSS 130.

III.

The petitioner was issued a reentry permit by the Immigration and Naturalization Service in 1955 and returned to Switzerland for a temporary period of about four months.

IV.

On petitioner's return to the United States, he was held for hearing before a Special Inquiry Officer at the port of New York on October 14, 1955.

V.

The petitioner was released on parole and permitted to proceed to San Francisco, California, where proceedings were conducted before a Special Inquiry Officer.

VI.

The Special Inquiry Officer found the petitioner excludable under the provisions of Section 212(a)(22) of the Immigration and Nationality Act of 1952 as an alien permanently ineligible to become a citizen of the United States under the provisions of Section 315(a) of the Immigration and Nationality Act of 1952.

VII.

Petitioner appealed from the decision of the Special Inquiry Officer, and on February 13, 1956, the appeal was dismissed by the Board of Immigration Appeals at Washington, D. C. A copy of the de-

cision of the Board of Immigration Appeals is annexed hereto, marked Exhibit A, and made a part hereof.

VIII.

Petitioner filed motion to reconsider with the Board of Immigration Appeals on March 5, 1956, and said motion was denied by the Board of Immigration Appeals on June 13, 1956. A copy of the petitioner's motion and of the order of the Board of Immigration Appeals denying said motion are annexed hereto, marked Exhibits B and C respectively, and made a part hereof.

IX.

As will more fully appear from the annexed exhibits, the Special Inquiry Officer and Board of Immigration Appeals have found that the petitioner is excludable from the United States under Section 212(a)(22) in that he is an alien ineligible to citizenship under the provisions of Section 315(a) of the Immigration and Nationality Act of 1952.

X.

The decision of the Special Inquiry Officer and Board of Immigration Appeals is clearly erroneous and without authority in law, in that the petitioner, prior to the effective date of the Immigration and Nationality Act of 1952, had a right to depart from and reenter the United States after temporary visits abroad notwithstanding his ineligibility to citizenship, and such right to depart and reenter was saved

by the provisions of Section 405 of the Immigration and Nationality Act of 1952.

XI.

By reason of the premises, the petitioner has been denied a fair hearing and has been denied due process of law, in that the Special Inquiry Officer and the Board of Immigration Appeals have excluded him from the United States under an erroneous conclusion of law.

XII.

No prior petition for a writ of habeas corpus has been made in regard to the detention and restraint complained of herein.

XIII.

During the pendency of said exclusion proceedings, the petitioner has at all times been at large without bond and has at all times appeared before the immigration authorities whenever called upon to do so.

Wherefore, petitioner prays that a writ of habeas corpus issue herein, directed to Bruce G. Barber, District Director, San Francisco, California, commanding him to have the body of said petitioner before this court at a time and place therein specified, to do and receive what shall then and there be considered by this court concerning said petitioner and the time and cause of detention, and that said petitioner may be restored to his liberty, and that upon the issuance of an order to show cause herein

the petitioner may remain at liberty without bail pending the further order of this Court.

Dated:

PHELAN & SIMMONS,
Attorneys for Petitioner.

By /s/ MILTON T. SIMMONS.

Duly verified.

[Endorsed]: Filed July 25, 1956.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Good cause appearing therefor, and upon reading the verified petition on file herein;

It Is Hereby Ordered that Bruce G. Barber, District Director, Immigration and Naturalization Service, San Francisco, California, appear before this Court on the 3rd day of August, 1956, at the hour of 10 a.m. of said day, to show cause, if any he has, why a writ of habeas corpus should not be issued herein, as prayed for, and that a copy of this order be served upon the said District Director of the Immigration and Naturalization Service, San Francisco, California, and that a copy of the petition be served upon the United States Attorney at San Francisco, California, his representative herein.

Dated July 25, 1956.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed July 25, 1956.

[Title of District Court and Cause.]

RETURN TO ORDER TO SHOW CAUSE AND RESPONSE TO PETITION FOR A WRIT OF HABEAS CORPUS

Comes Now the respondent Bruce G. Barber, District Director of Immigration and Naturalization Service, San Francisco, California, and makes the following Return to the Order to Show Cause issued by the above Court on July 25, 1956, and to the Petition for a Writ of Habeas Corpus.

I.

The allegations of Paragraphs I, II, III, IV, V, VI, VII, VIII, IX, XII and XIII are true, except the allegation in Paragraph IV that petitioner was held for hearing at the Port of New York on October 14, 1955. This date was September 27, 1955. The proceedings were conducted in San Francisco, California, before a Special Inquiry Officer on October 14, 1955.

II.

The allegations of Paragraphs X and XI are denied.

Wherefore, the respondent prays that the petitioner take nothing by his petition herein, that the order to show cause be discharged, that the petition be denied, and the action dismissed.

LLOYD H. BURKE,
United States Attorney,

By /s/ CHARLES ELMER COLLETT,
Asst. United States Attorney.

[Endorsed]: Filed August 3, 1956.

[Title of District Court and Cause.]

ORDER GRANTING PETITION FOR WRIT OF HABEAS CORPUS

Petitioner is a citizen of Switzerland who has been a resident of the United States since July 1, 1949, when he was lawfully admitted as a permanent resident. On April 1, 1955, preparatory to a contemplated trip to Switzerland, petitioner obtained a permit to reenter the United States. Thereafter he departed from this country and went to Switzerland. Upon his return to the United States on September 27, 1955, he was denied admittance under the Immigration and Nationality Act of 1952 as an alien ineligible for citizenship. Pending the outcome of exclusion proceedings, he was paroled into the United States. Upon the unfavorable termination of these proceedings, he tendered the present petition alleging that Immigration and Naturalization Service erred in finding that he is an excludable alien. An order to show cause was issued and the case was submitted upon the record of the exclusion proceedings.

Section 212 of the Immigration and Nationality Act of 1952 (8 USC 1182), which is presently in effect and which was in effect when petitioner was denied entry into the United States on September 27, 1955, provides that an alien who seeks entry as an immigrant alien and who is ineligible to citizenship shall be excluded from admission to the United States. It is conceded that petitioner, as a returning

alien, previously admitted for permanent residence, has the status of an immigrant alien. Immigration and Nationality Act of 1952 § 101(15), 8 USC 1101 (15).

Section 315 of the Immigration and Nationality Act of 1952 (8 USC 1426) makes permanently ineligible for citizenship any alien who has applied for exemption from service in the Armed Forces of the United States on the ground of alienage and who was relieved from service on such ground. Petitioner applied for relief from service in the Armed Forces on the ground of alienage on March 19, 1951, and, on the same day was granted such relief. Section 4 of the Selective Service Act of 1948, 50 USC Appendix 454, as it then read, provided that resident aliens might apply for exemption from military service, and if they did so, they would thereafter be debarred from citizenship.[1] Thus assuming the regularity of petitioner's application for and grant of exemption from military service, it is clear that he is an alien ineligible for citizenship.

Petitioner contends, however, that he is not excludable under Section 212 of the Immigration and Nationality Act of 1952 as an immigrant alien ineligible for citizenship because the savings clause of that Act, Section 405, preserves the non-excludable status he had under the prior law.

---

[1]A subsequent amendment to the Selective Service Act of 1948 made aliens admitted for permanent residence liable for military service without the privilege of applying for exemption on the ground of alienage., 64 Stat. 1073, June 19, 1951.

The savings clause of the 1952 Act provides that "Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect * * * any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such * * * statuses, conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect."

The Immigration Act of 1924 [Sections 4(b) and 13(c), 8 USC §§ 204(b) and 213(c), 1946 Ed.], the applicable statute in force prior to the effective date of the 1952 Act, while excluding generally immigrant aliens ineligible to citizenship, excepted from this exclusionary provision, immigrants previously lawfully admitted to the United States returning from a temporary visit abroad. Thus under the statute in force prior to the 1952 Act, petitioner had a status as a resident alien enabling him to depart the United States on temporary visits abroad and return, even though he was ineligible for citizenship.

In my opinion, the savings clause of the 1952 Act is sufficiently broad to preserve this status. I do not read it as being limited to the preservation of inchoate rights in the process of acquisition as did the Court in Paris v. Shaughnessy, 138 F. Supp. 36 (S.D.N.Y. 1956), relied upon by the Government.

The savings clause is an exceptionally sweeping one designed for a statute which constituted a complete revision of our immigration law. It should be applied, as was obviously intended, to forestall the deprivation of a status gained under the prior law, unless it clearly appears that Congress had a contrary intent. There is no reason to believe that the Congress wished to suddenly circumscribe the movements of resident aliens who theretofore had been free to leave the United States temporarily and return.

The Government notes that in addition to the savings clause, Section 405 of the 1952 Act contains another clause providing that "When an immigrant, in possession of an unexpired immigrant visa issued prior to the effective date of this Act, makes application for admission, his admissibility shall be determined under the provisions of law in effect on the date of the issuance of such visa." As well, the Government refers to pertinent authority that for purposes of entry an immigration visa is the equivalent of a reentry permit. United States ex rel. Polymeris et al. v. Trudell, 284 U.S. 279 (1932); Rederiaktiebolaget Nordstjernen vs. United States, 61 F. 2d 808 (9 Cir. 1932). The conclusion of the Government is that the admissibility of an immigrant in possession of an unexpired reentry issued, as was petitioner's, after the effective date of the 1952 Act, must be determined under that Act. But, assuming the validity of this conclusion, since the savings clause is part of the 1952 Act, the net

result still is that the savings clause is determinative that petitioner is admissible.

Ordered that a writ of habeas corpus be issued and the order of exclusion be vacated.

Dated: September 18, 1956.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed September 18, 1956.

In the United States District Court for the Northern District of California, Southern Division

No. 35712

In the Matter of

The Application of KURT RIETMANN for a Writ of Habeas Corpus.

ORDER ISSUING WRIT OF HABEAS CORPUS AND DISCHARGING THE PETITIONER

This Court, having heretofore considered the petition for writ of habeas corpus filed herein and the return of the respondent to the order to show cause, and the matter having been heretofore fully presented and heard on such petition and return, and this Court having on September 18, 1956, en-

tered its opinion and order granting the said petition and ordering that a writ of habeas corpus be issued and the order of exclusion be vacated, and it further appearing to the satisfaction of the Court that no issue of fact remains to be tried in this habeas corpus proceeding, and all issues of law arising therein having been fully presented and considered; now, therefore,

It Is Hereby Ordered that the writ of habeas corpus is hereby granted and issued and that the petitioner be and hereby is discharged from the custody of the respondent.

Dated: November 8, 1956.

s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed and entered November 9, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the United States hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order of the United States District Court for the Northern District of California made and entered September 18, 1956, granting the petition for writ of habeas corpus and vacating the order of exclusion.

Dated: November 13, 1956.

LLOYD H. BURKE,
United States Attorney.

By /s/ CHARLES ELMER COLLETT,
Asst. United States Attorney.

[Endorsed]: Filed November 13, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the United States hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order of the United States District Court made and entered November 9, 1956, issuing the writ of habeas corpus and discharging the petitioner in the above-entitled matter.

Dated: December 12, 1956.

LLOYD H. BURKE,
United States Attorney.

By /s/ CHARLES ELMER COLLETT,
Assistant U. S. Attorney.

[Endorsed]: Filed December 12, 1956.

[Title of District Court and Cause.]

EXCERPT FROM DOCKET ENTRIES

1956

July 25—Filed petition for writ of habeas corpus.

July 25—Filed order to show cause, returnable Aug. 3, 1956, at 10:00 a.m. (Goodman.)

Aug. 3—Filed return of defendant.

Aug. 3—Ordered after hearing case submitted. (Goodman.)

* * *

Sept. 18—Filed order granting petition for habeas corpus, writ to be issued and order of exclusion vacated. (Goodman.)

* * *

Nov. 9—Filed order writ of habeas corpus and discharge of petitioner. (Goodman.)

* * *

Nov. 13—Filed notice of appeal by defendant.

* * *

Dec. 12—Filed appellant's designation of record on appeal.

Dec. 12—Filed notice of appeal by defendant from order or Nov. 9, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein as designated by the attorneys for the appellant:

Excerpt From Docket Entries.
Petition for Writ of Habeas Corpus.
Order to Show Cause.
Return of Defendant to Order to Show Cause.
Order Granting Petition.
Order Issuing Writ of Habeas Corpus and Discharging Petitioner.
Notice of Appeal.
Notice of Appeal.
Designation of Record on Appeal.
Respondent's Exhibit A.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 21st day of December, 1956.

[Seal] C. W. CALBREATH,
Clerk;

By /s/ MARGARET P. BLAIR,
Deputy Clerk.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Bruce G. Barber, District Director, Immigration and Naturalization Service, San Francisco, California, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the Order of the United States District Court made and entered November 9, 1956, issuing the writ of habeas corpus and discharging the petitioner in the above-entitled matter.

Dated: December 28, 1956.

LLOYD H. BURKE,
United States Attorney;

By /s/ MARVIN D. MORGENSTEIN,
Assistant U. S. Attorney.

[Endorsed]: Filed December 28, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO SUPPLEMENTAL RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying document, listed below, is the original filed in this Court in the above-entitled case and constitutes a supplemental record on appeal herein:

Notice of Appeal (amended).

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 2nd day of January, 1957.

[Seal] C. W. CALBREATH,
Clerk;

By /s/ MARGARET P. BLAIR,
Deputy Clerk.

[Endorsed]: No. 15394. United States Court of Appeals for the Ninth Circuit. Bruce G. Barber, District Director, Immigration and Naturalization Service, San Francisco, California, Appellant, vs. Kurt Rietmann, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed December 24, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15394

BRUCE G. BARBER, District Director, Immigration and Naturalization Service,

Appellant,

vs.

KURT RIETMANN,

Appellee.

STATEMENT OF POINTS

Appellant states the following points on appeal:

(1) The Court erred in holding that petitioner had a status as a resident alien enabling him to depart from the United States on temporary visits abroad and return, which was saved to him by Sec. 405 (the Savings Clause) of the Immigration and Nationality Act of 1952, even though he was debarred from citizenship under Sec. 4 of the Selective Service Act of 1948 (50 U.S.C. App. 454) and inadmissible to the United States under Sec. 212(a) (22) of the Immigration and Nationality Act.

(2) The Court erred in holding that the Savings Clause of the Immigration and Nationality Act of 1952, Sec. 405, preserved to petitioner a nonexcludable status, although he was debarred from citizenship under Sec. 4 of the Selective Service Act of 1948 and inadmissible to the United States under Sec. 212(a) (22) of the Immigration and Nationality Act of 1952.

(3) The court erred in failing to hold that petitioner upon his return to the United States on September 27, 1955, being debarred from citizenship under Sec. 4 of the Selective Service Act of 1948, was inadmissible to the United States under Sec. 212(a) (22) of the Immigration and Nationality Act of 1952.

(4) The Court erred in granting and issuing the writ of habeas corpus.

(5) The Court erred in discharging petitioner from the custody of respondent.

LLOYD H. BURKE,
United States Attorney;

By /s/ CHARLES ELMER COLLETT,
Assistant U. S. Attorney.

[Endorsed]: Filed January 8, 1957.